SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 78

HERBERT W. GOLDBLATT and
BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

MILTON I. NEWMAN
Counsel for Appellants
29 Broadway
New York 6, N. Y.

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JURISDICTIONAL STATEMENT

(a) Report of Opinions in Courts Below:

The court of original jurisdiction wrote an opinion (19 Misc. 2d 176) which is set forth at folios 685-729* of the certified Record on Appeal.

The Appellate Division affirmed, without opinion (9 A. D. 2d 941).

In the Court of Appeals there was a majority opinion (four judges concurring), upholding the constitutionality

* All numbers in parentheses refer to pages of the Record on Appeal in Court of Appeals.

of the Ordinance in issue and a dissenting opinion (three judges concurring), reported in 9 N. Y. 2d 101. Both opinions are set forth in the Appendix (Exhibit 1).

A copy of the order of the Court of Appeals, certifying a constitutional question is set forth at folios 772-774 of the Record on Appeal.

The opinion of the Supreme Court of the State of New York (Nassau County) in a companion case between the parties, is set forth in Appendix (Exhibit 2); and the judgment entered thereon is printed in the Appendix (Exhibit 3). A copy of the Order of Remittitur of the New York Court of Appeals is set forth in the Appendix (Exhibit 5) and the judgment of the Supreme Court (Nassau County) is Exhibit 6 of Appendix.

(b) The Jurisdiction of This Court Is Based on the Following:

(i) This action was commenced by a complaint (16-39) which sought an injunction prohibiting appellants from excavating sand and gravel from their property (38 acres) located in the Town of Hempstead (Nassau County, State of New York) on the ground that such excavation violated the provisions of Ordinance No. 16 of the Town of Hempstead, as amended in 1958.

The answer of appellants (40-51) contained denials and also affirmative defenses, *viz.*: that the complaint should be dismissed (1) because of a prior judgment which constituted a bar to the maintenance of the action, and (2) because Ordinance No. 16, as amended in 1958, was unconstitutional since it prohibited all further excavation and, therefore, constituted an unlawful taking of appellants' property without payment therefor, in violation of the due process provisions of the Fourteenth Amendment of the Constitution of the United States and also because it constituted *ex post*

facto legislation, in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States.

(ii) The final order and judgment of the Court of Appeals, affirming the judgment of the Courts below, holding Ordinance No. 16 constitutional, was dated and filed on January 19, 1961. The Notice of Appeal to this Court was served and filed on March 30, 1961, in the office of the Clerk of the Supreme Court (County of Nassau), which is the Court possessed of the record and proceedings in this cause.

(iii) Jurisdiction of the appeal to this Court is conferred by the provisions of 28 United States Code, Section 1257(2). The Court of Appeals of the State of New York is the highest Court of that State and the order and judgment of that Court affirms the constitutionality of a statute which violates the due process provisions of the Fourteenth Amendment and the *ex post facto* provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court include the following:

Pennsylvania Coal v. *Mahon*, 260 U. S. 393;
Panhandle Oil Company v. *State Highway Commission*, 294 U. S. 613;
Dobbins v. *Los Angeles*, 195 U. S. 223;
Hadacheck v. *Los Angeles*, 239 U. S. 394;
Queenside Hills Realty Company v. *Saxl*, 328 U. S. 80;
Paulos v. *New Hampshire*, 345 U. S. 395, 402.

(v) Ordinance No. 16 of the Town of Hempstead (as amended on November 25, 1958) is set forth in full on pages 10-13 of the certified Record on Appeal. The pertinent text of this Ordinance is set forth in the Appendix (Exhibit 4).

(c) Questions Presented by This Appeal

This appeal involves the constitutionality of Ordinance No. 16, as amended on November 25, 1958. Appellants contend that the Ordinance violates the Constitution of the United States in two major respects:

(i) It violates the due process clause of the Fourteenth Amendment of the Constitution of the United States (a) insofar as it takes away appellants' property and business without payment therefor; and (b) because the Ordinance overrules and sets aside vested rights of appellants, "established by a solemn judgment" (*Massingill* v. *Downs*, 48 U. S. 760, 768) rendered by the Supreme Court of the State of New York, County of Nassau on April 5, 1956 (Exhibits 2 and 3 of Appendix), *permitting* appellants to carry on their business of excavating sand and gravel on their property in the very manner now *prohibited* by the said Ordinance; and

(ii) Insofar as the Ordinance provides criminal sanctions and punishment for doing acts which were legal when done, the Ordinance violates the Constitutional provisions prohibiting *ex post facto* laws (Article 1, Section 10, Clause 1 of the Constitution of the United States).

(d) Statement of the Case

The appellant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead. The other appellant, Builders Sand and Gravel Corporation (all of whose shares of stock are owned by Goldblatt), was the operator of the business of excavating and selling sand and gravel taken from the land in litigation (18, 19). The property was purchased by Goldblatt's father in 1927 and the business of excavating and selling sand and gravel taken from the

property was carried on from 1927 until 1959, when the judgment of injunction was obtained (306-309, 325, 476).

In 1928, a year after operations began, the excavating had gone below water level and an artificial lake was created, averaging 25 feet in depth (149-152, 307-309, 157, 476). This body of water, therefore, was in existence for 30 years and appellants' excavation operations, exclusively done under water, had been carried on 30 years before the 1958 Amendment of Ordinance No. 16.

From 1927 to 1958, there were no regulations governing appellants' excavating operations under water.

In 1945, Ordinance No. 16 was enacted and provided regulations for the conduct of appellants' excavating operations, such as providing for a six foot wire mesh fence (which now completely surrounds appellants' property) and for degrees of slope, etc. Appellants complied with all these regulations of the 1945 Ordinance (235, 314-16, 319, 527, 528, 532) and continued to conduct their underwater excavating and dredging until 1956, when the appellee-Town decided to put a stop to appellants' operations.

No claim was made that appellants violated any of the *regulatory* provisions of the 1945 Ordinance No. 16. However, the Town brought an action in 1956 in the Supreme Court (Nassau County) to enjoin appellants from continuing their business of excavating sand and gravel on the theory that these activities violated the Zoning Ordinance of Hempstead. After trial, appellants had judgment (Exhibit 3 of Appendix), which expressly provided that appellants had the legal rights of "a prior non-conforming use in the conduct of the sand and gravel business, which may be carried on *on the entire premises* • • • notwithstanding any ordinance of the plaintiff [appellee]". In the opinion written by the Court in that case (Ap-

pendix, Exhibit 2) it was expressly stated: "I find that the defendants [appellants herein] are now and have been since 1927, conducting a prior non-conforming use on the premises and have made such a substantial investment in improvements in the business to warrant a continuation of its non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537."

In 1957, the appellee-Town brought an action to enjoin appellants from operating a concrete-mixing operation in connection with their sand and gravel business. That litigation terminated in an injunction preventing appellants from engaging in the concrete business on the ground that it would constitute an improper extension of their non-conforming use (4 App. Div. (2) 970; appeal denied 4 N. Y. (2) 674).

In 1958, the appellee-Town amended Ordinance No. 16 to accomplish precisely what it failed to accomplish in the 1956 lawsuit, *viz.*: the absolute prohibition of all sand and gravel excavation under water (see Section 4 (h) of the Ordinance).

Since appellants operate the only sand and gravel business in Hempstead by dredging operation (577), it would appear indisputable that the 1958 Amendment was directly aimed at them.

Not only does the 1958 Ordinance overrule the 1956 judgment, but Section 4(j) of the Ordinance (Appendix, Exhibit 4) requires appellants to refill the entire excavation (lawfully made 1927-1958) with "clean non-burnable fill". Approximately 1,000,000 cubic yards of fill have been removed in appellants' 30 year operations (237) so that the cost of refilling would be approximately $1,000,000. The 1958 Ordinance (Section 10) provides for punishment by fine of not more than $500 or imprisonment for

a period not exceeding six months, or both, for each offense and provision is made that "each week's continued violation shall constitute a separate additional violation".

About a year before the Town enacted the 1958 Amendment, prohibiting appellants from all underwater excavating, it also prepared plans for a system of drainage, which included the use of appellants' property (281-300 and Exhibit C).*

The acquisition of appellants' property by the constitutional route of eminent domain was actually discussed by the Town with appellants (Exhibit A and cf. 292, 293, 331). However, instead of using its power of condemnation the Town decided to test the validity of the 1958 Ordinance which would effectively give appellants' property to the Town, without payment. Accordingly, this injunction action was begun in 1959.

Admittedly, appellants' removal of sand and gravel under water is in direct violation of the 1958 Ordinance (Section 4(h)) and, therefore, if the Ordinance is held constitutional, appellants are not only prohibited "unconditionally and finally" from excavating and carrying on their business of "underwater dredging previously conducted on 20 acres of [appellants'] property" (opinion of Van Voorhis, *J.*, Appendix, p. 6a), but they are required to spend $1,000,000 to fill in the excavation "lawfully created", under criminal penalties provided in the Ordinance (Section 10).

Appellants' first pleading (their answer to the complaint (40-51)) raised the constitutional issues involved herein.

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* The dissenting opinion of Judge Van Voorhis takes note of the fact that appellants' property was included in the Town's 1957 drainage plans.

After trial (61-684), judgment was entered (52-60) granting the injunction, based on the holding of constitutionality of the 1958 Ordinance No. 16.

The judgment of the Trial Court was affirmed by the Appellate Division of the Supreme Court, without opinion (757-762).

The appeal was argued in the Court of Appeals in October, 1960, and the Court handed down its order of affirmance in January, 1961. Both the majority opinion and the minority opinion (Appendix, exhibit 1) expressly state that the main issue involved on the appeal is the constitutionality of Ordinance No. 16, as amended in 1958.

The very first sentence of the majority opinion (Appendix, Exhibit 1) is:

> "The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in volation of the due process clause of both the Federal and State Constitutions."

The dissenting opinion concludes (Appendix, p. 10a) that Ordinance No. 16 not only violates the due process clause of the Fourteenth Amendment of the United States Constitution, but also states (Appendix, p. 6a) that the Ordinance "may well be regarded as oppressive and condemned by the constitutional prohibition against *ex post facto* laws (U. S. Const., Art. 1, Sec. 10)".

Prior to the hearing of the appeal in the Court of Appeals, that Court made an order dated April 28, 1960 (772-774), pursuant to Section 588(1)(a) of the N. Y. Civil Practice Act providing that "there be directly involved" a constitutional question.

The foregoing review of the proceedings in the New York Courts—particularly in the Court of Appeals of the State of New York—demonstrates that this Court has jurisdiction of this cause under provisions of 28 U. S. C. Section 1257(2), since (1) there is directly involved the legality of Ordinance No. 16 of the Town of Hempstead, as amended in 1958, under the provisions of the Constitution of the United States and (2) the highest court of the State of New York has sustained the constitutionality of that legislation.

(e) The Federal Questions Are Substantial

(1) There are no disputed issues of fact upon which the ultimate determination of constitutionality of the 1958 Ordinance depends. This Ordinance by its terms (Section 4(h)) immediately and forever prohibits all further excavation on 20 acres of appellants' property. The validity of the Ordinance has been sustained on the premise adopted in the majority opinion that the Ordinance does *not* "proscribe any future excavation", but "merely" provides regulations for excavating. The dissenting opinion finds the Ordinance unconstitutional under the holding of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416, that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking • • • ."

The fact that the Ordinance *does* prohibit and *does* "proscribe future excavation" is conclusively demonstrated, as follows:

Appellants' excavating operations were entirely and wholly under water. In other words, appellants' excavation is accomplished by hydraulic dredging under water (307, Exhibits 2, 3, 6A, 6B, 6F, 6N, and 6R). This method of dredging sand and gravel under the artificial lake, cov-

ering 20 acres, had been employed for 30 years when the 1958 Ordinance was enacted.

Section 4(h) of the 1958 Ordinance (Appendix, Exhibit 4) provides:

> "No excavation shall be made below two feet *above* the maximum ground water level at the site" (Emphasis added).

Since appellants' excavations are admittedly 25 feet (average) *below* "maximum ground water level", it is readily apparent and cannot be denied (1) that appellants' operations violate Section 4(h) of the 1958 Ordinance, (149-152, 155-157) which prohibits all excavation "below 2 feet *above* maximum ground water level" and (2) that all appellants' future operations are prohibited; and the judgment so provides (58).

Not only does Section 4(h) thus prohibit all further excavation under the artificial lake but Section 4(j) of the 1958 Ordinance (and the injunction (59) which sustains the Ordinance) requires appellants to refill the entire excavation, covering 20 acres "with clean, non-burnable fill". Section 4(j) (Appendix, p. 15a) provides:

> "When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance • • • such pit or part thereof shall be immediately refilled with clean, non-burnable fill • • • and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads".

As pointed out previously, more than 1,000,000 cubic yards of sand and gravel have been removed from the acreage in litigation (237) and the $1,000,000 cost of re-

filling would make it impossible to bring the property back to its 1927 condition. Appellants will have to default in payment of land taxes and the appellee-Town will end up by acquiring appellants' property, without any payment therefor. See opinion of Van Voorhis, *J.* (Appendix, p. 8a):

> "* * * the purpose [of the 1958 Ordinance] was expropriation rather than regulation".

Although the trial court erroneously prevented appellants from showing the full value of their property and improvements affected by the Ordinance, the evidence which was admitted showed a gross annual business of appellants in excess of $200,000, a capital investment of approximately $241,000 and an assessed valuation of $66,000 (457 and Exhibit I). This is the property of appellants which has been taken, without due process.

It is not denied that appellants' excavation operations constituted a legal, non-conforming zoning prior use of appellants' property. This non-conforming use, often described as a "vested right," was adjudicated in the 1956 litigation (Appendix, Exhibits 2 and 3), in which the appellee-Town sought to prevent appellants' underwater excavating. As pointed out by Judge Van Voorhis (Appendix, p. 8a): the 1958 Amendment to the Ordinance No. 16 was "designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance."

(2) Beyond the immediate result to appellants in wiping out their very valuable rights in 38 acres of land located in Nassau County, New York, the issue presented in this case, viz.: eliminating a non-conforming use by legislation, is a matter of major concern throughout the country. No one will dispute the propriety or desirability of the pur-

pose expressed in the majority opinion that "there must be progress" and that sometimes "private interests * * * must yield to the good of the community." However, the issue in this case, which has confronted other growing communities throughout the country, is how this elimination of non-conforming uses may be accomplished constitutionally and without violating the due process clause of the Fourteenth Amendment. The subject has been the source of much litigation throughout the country and has been the topic of numerous legal commentaries and writings, many of which are considered in the majority and dissenting opinions of the Court of Appeals in *Harbison* v. *City of Buffalo*, 4 N. Y. 2nd 553 (1958).

The learning on the subject is summarized in an article in 44 Cornell Law Quarterly 450 (1959) entitled "Elimination of Non Conforming Use by 'Amortization'," in which the author concludes (p. 453): "The law is settled that retroactive zoning ordinances and ordinances requiring immediate cessation of prior non conforming uses are unconstitutional because they are too harsh and unfair." See also: "Amortization of Non Conforming Use Under Regulatory Guise" (7 Syracuse Law Review 158).

Current litigation in numerous jurisdictions (reported in the *Harbison* opinions) discloses the attempt of Legislatures to eliminate non-conforming uses by the inclusion of amortization provisions. Whatever be the validity of such statutory provisions, the fact is that in the instant case no provision is made for amortization or for any other payment to appellants for the elimination and confiscation of their rights. To the contrary, not only are all future operations prohibited but appellants are required to fill in an excavation extending over 20 acres of their property, containing a lake with an average depth of 25 feet.

(3) The appellee-Town does not argue with the fundamental principle (*People* v. *Miller*, 304 N. Y. 105; *Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *Buffalo*, 4 N. Y. (2) 553) that non-conforming uses may not be eliminated constitutionally without payment therefor. The contention of the Town, which was adopted in the majority opinion of the Court of Appeals, is (1) that the ordinance does *not* prohibit but only *regulates* appellants' operations, and (2) there is no confiscation or taking of appellants' property because the prohibition against excavating and the requirement of filling up the excavation applies only to the 20 acres underwater and, therefore, appellants may continue to excavate on their 18 acres not underwater. We shall now show that both these contentions are untenable.

(4) In support of its conclusion that 1958 Ordinance No. 16 does not "proscribe" or prohibit appellants' activities but only provides rules and regulations, enacted under the Town's police powers, the majority opinion cites *South Carolina Highway Dept.* v. *Barnswell Bros.*, 303 U. S. 177 (a case involving *regulation* of trucks on highways) and also points out that this Court has sustained *regulatory* provisions involving "pre-existing uses," citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, and *Engelsher* v. *Jacobs*, 5 N. Y. 2d 370 (cert. den. 360 U. S. 902).

In sustaining the Ordinance the majority opinion states that the Ordinance "merely conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance." This analysis of the Ordinance cannot possibly be reconciled with the express and unambiguous prohibitory language of Section 4(h). There is no way appellants can comply with the prohibition of underwater operations provided for (in Section 4(h) of the Ordinance) except by *not* excavating underwater. This is a situation of *total* prohibition, such

as existed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393,—not "merely" regulation of excavating activities.*

The decisions in the *Saxl* and *Jacobs* cases (relied on in the majority opinion) are totally inapplicable because in those cases the Ordinances involved "were truly 'regulatory' ordinances which did not operate to confiscate and prohibit absolutely" (Appendix, p. 6a). In the *Jacobs* case the ordinance regulated the number of beds which could be put in hospital rooms of certain sizes. There was nothing in the ordinance which prevented the hospital from carrying on its hospital business. Likewise, in the *Saxl* case this Court sustained state legislation regulating and requiring such things as an automatic sprinkler system in lodging houses. However, the ordinance in the *Saxl* case did not prohibit the business of conducting a lodging house. The type of prohibitory provisions struck down in the *Pennsylvania Coal* case was not present in *Saxl*, which does not even cite the *Pennsylvania Coal* case.

The opinion in the *Saxl* case cites *Hadacheck* v. *Los Angeles*, 239 U. S. 394, which the majority opinion also cites. In *Hadacheck*, this Court (239 U. S. at pp. 411 and 412) expressly pointed out the difference between a prohibition of the use of one's land (the situation in our case) and the prohibition of a business located on the land—which business could be physically moved to another location. The *Hadacheck* case involved a brick-making factory located on property containing clay used in the making of

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* The fact of total prohibition contained in Section 4 (h) of the Ordinance has been so difficult—nay impossible—to answer that the appellee-Town in one of its briefs argued that appellants could use the man-made lake for boating and swimming uses. Since this argument overlooked the requirement of Section 4 (j) that the lake be refilled and since the argument was contradictory to the Town's *assumed* (but false) major premise that water is dangerous, the argument was later discontinued.

the bricks. This Court, noting (p. 410) that in *Ex parte Kelso* (147 Cal. 609) a statute prohibiting the maintenance of a rock quarry within the City of San Francisco was held unconstitutional (as a prohibition against the use of the real property itself), pointed out that the legislation attacked contained "no prohibition of the removal of brick clay" (p. 411) but only prohibited the manufacturing of brick. This Court itself posed the quaere (p. 412) whether a total prohibition of removal of the clay from the property would be a violation of the due process clause, as was held in *Ex parte Kelso.*

When the quaere raised in *Hadacheck* was later litigated, it was held in *Terrace Park* v. *Errett,* 12 Fed. 2d 240, 243 (C. A. 6, 1926; cert. den. 273 U. S. 710) that an ordinance which would have prohibited further excavation of sand and gravel from one's property was unconstitutional. The Court in the *Errett* case, citing the *Hadacheck* case, said (p. 243):

> "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles,* 239 U. S. 394."

(5) The majority opinion of the Court of Appeals affirmed the legality of the 1958 Ordinance on the rule of "presumption of constitutionality" in the mere enactment of the statute. However, in our case this presumption was overcome (a) by the undisputed fact that appellants had a vested right of a non-conforming use which the 1958 Ordinance prohibited and wiped out, without payment, and (b)

by the undisputed fact that there was no proof of any danger, peril, nuisance or the like in appellants' operations which might have been the basis for sustaining even regulation—let alone prohibition—thereof.

The majority opinion does not point out any such danger, peril or nuisance involved in appellants' operations. And there was no proof of any such danger, peril or nuisance.

In stating its conclusion of legality, the majority opinion referred to the number of homes and schools located in the neighborhood of appellants' property. In the first place, appellants "did not bring their business into a residential area; [appellants'] neighbors voluntarily came into this area where [appellants'] operations and the artificially created lake were evident and obvious" (Appendix, p. 4a). In any event, the existence of the homes and schools *per se* constitutes no basis for a finding of "danger to the public" (*Panhandle* v. *State Highway*, 294 U. S. 613, 619).

There was no proof of a single accident, injury or harm to any person on appellants' premises in the 30 years of continuous hydraulic operations. There was no proof of even a single trespasser. There was no proof of any cave-ins or any property damage to neighboring homes or property; or that any current damage to surrounding property existed because of appellants' dredging. To the contrary, the uncontradicted proof was that there never had been any "cave-in or tearing away of the bank" or slopes (464-469); and there was uncontradicted affirmative testimony that the bank or slope surrounding the water is "stable" (469).

In lieu of testimony *re*: danger, the Trial Court and the majority opinion of the Court of Appeals refer to "obvious dangers" and "common knowledge" of such alleged "obvious dangers." The fact is that it is *not* "obvious" and it is

not "common knowledge" that appellants' operations—whatever the situation may be in the operations of others—constitute any "grave threat to human life and to property" or constitute a public nuisance. As noted by Judge Van Voorhis: contrary to the unfounded assumption of "nuisance" made by the Trial Court and majority Court of Appeals' opinion, appellee's counsel stated on the oral argument in the Court of Appeals, that he did "not contend that this condition [of appellants' operations] amounts to a nuisance" (Appendix, p. 8a).

There is nothing inherently dangerous or evil about appellants' business nor about excavating under water. There was no proof that the water existing on appellants' 20 acres presented a dangerous condition.* This artificial lake is completely surrounded by 7,000 lineal feet of 6 foot wire fence topped by 3 strands of barbed wire, in good condition, constructed in accordance with the 1945 regulatory ordinance. As pointed out in the dissenting opinion (Appendix, p. 10a) there was evidence of "ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences."

The excavating and selling of sand and gravel is an important and legitimate business. The 1959 statistics of the U. S. Bureau of Mines show that this business totalled more than $700,000,000, more than $27,600,000 in New York alone. In the "declaration of policy" of the 1958 Ordinance (Article I, Section 1), it is stated that the Ordinance was "enacted to suppress" such "lawful business" (Appendix, p. 9a) conducted by appellants without peril or danger to the community. The Court of Appeals itself had previously

* The argument of appellee-Town, now discarded (see footnote *supra* p. 14), that appellants could use the water for boating, swimming, etc., for use by children is contrary to the theory (not fact) of water being dangerous, *per se*.

recognized that excavation of sand and gravel is a perfectly legitimate enterprise, and that a non-conforming use, consisting of sand operations, might not be eliminated by legislation, without payment therefor. *Town of Somers* v. *Camarco*, 308 N. Y. 537.

(6) In addition to the contention that the 1958 Ordinance is only "regulatory," appellee also argued that the requirement of the 1958 Ordinance (Section 4(h)) was not unconstitutional because the prohibition against excavating underwater involved only the 20 acres of appellants' 38 acres underwater and left 18 acres (not yet under water) available for excavation. This argument which was adopted, *in toto*, in the majority opinion (which stated: "There are approximately 18 acres which are available for excavation") is wholly insufficient to sustain the taking of appellants' 20 acres. First, the equipment of appellants, used in the underwater dredging, is actually located on these 18 acres not underwater, and therefore, excavation on these 18 acres is not available (see Exhibits 2, 6G and 6P). Second, the requirement that no excavation shall proceed to a depth lower than "two feet above maximum ground water level" (Section 4(h)) means that there can be no excavation on these 18 acres because these 18 acres are practically at water level (Exhibit 3 of Record on Appeal). More important: the argument that the taking of 20 acres is no taking because 18 acres remain, is a *non-sequitur*, erroneous in logic and in law.

Appellants' excavation business is the only one remaining in the Town of Hempstead. So that "it would appear that the Ordinance was aimed directly at them" (Appendix, p. 5a). To the extent that the legislation is directed against appellants, and since there is no showing that the excavation operations now are different from, or more dangerous then the operations conducted over the 30 year

period, the holding in *Dobbins* v. *Los Angeles*, 195 U. S. 223 is applicable.

(7) If we now assume, *arguendo*, that the political aim of this legislation (occasioned by "pressure groups" who "succeed in obtaining favorable action from a municipality," *Harbison* v. *Buffalo*, 4 N. Y. 2d, at p. 567) may have a desirable purpose or end, i.e., eliminating appellants' use of their property in excavation underwater, it certainly would not follow that this may be accomplished without paying therefor. Mr. Justice Holmes said in the *Pennsylvania Coal* case (260 U. S. at p. 416):

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Mr. Justice Holmes stated (p. 413) that the "constitutional way" was by the "exercise of eminent domain and compensation". Certainly the legislation in the *Pennsylvania Coal* case which was enacted to prevent underground coal mining, considered (by the highest Pennsylvania Court, 274 Pa. 489) to be hazardous to structures and homes located on the surface, concerned a situation much more dangerous than the underwater dredging involved in our case.

See also *Panhandle* v. *State Highway*, 294 U. S. 613, 619 where the Court, quoting the *Pennsylvania Coal* case, again points out that "condemnation" is the constitutional way of accomplishing changes believed to be for the "public welfare". See also *Berman* v. *Parker*, 348 U. S. 26, 36; *Armstrong* v. *United States*, 364 U. S. 40, 48; and 10 Syracuse Law Review 214.

As we previously noted, the appellee-Town had discussions with appellants concerning condemnation of appellants' property, but instead of exercising its power of eminent domain, the Town enacted the 1958 legislation, accomplishing the same purpose without paying for appellants' property. The record in this case sustains the conclusion of Judge Van Voorhis (Appendix, p. 18a) that the "object" of the 1958 Ordinance was "not to promote public health or safety [there is no evidence to sustain any such purpose] but to end the operation of this business under the guise of regulation."

We know of no case where a legislature has so directly eliminated and done away with an adjudicated non-conforming use, without any payment therefor. The most any legislature has previously done has been to eliminate non-conforming uses by providing for amortization of investment over a period of time. See *Harbison* v. *Buffalo*, 4 N. Y. 2d, 553 at p. 567. See also *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540.

(8) In addition to the fact that the 1958 Ordinance is not a *bona fide* exercise of police power, but rather is prohibitory and confiscatory legislation without legal justification, the Ordinance also violates two additional principles of constitutional law: (a) the legislation overrules and wipes out "vested rights" which appellants have in the judgment obtained in the 1956 litigation between the parties (Appendix, Exhibit 3) and (b) the legislation (Section 10) makes criminal an act, viz: excavating underwater, which was lawful when done.

(a) Insofar as Ordinance No. 16 prohibits appellants from doing exactly what appellants were authorized and permitted to do in the 1956 judgment, the ordinance is contrary to the legal principle of constitutional law, stated

in *McCullough* v. *Virginia*, 172 U. S. 102, 123: "It is not within the power of a legislature to take away rights which have once been vested by a judgment". In *Massingill* v. *Downs*, 48 U. S. 760, 768, this Court held • • • "no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." See also *Worthen Co.* v. *Thomas*, 292 U. S. 426, 431, 432; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60.

There is nothing that happened with respect to appellants' operations between 1956 (when appellants' obtained their judgment (Appendix, p. 13a) and 1958 (date of Ordinance) which showed or even indicated appellants' operations had changed or became more dangerous.

(b) Finally, Article I, Section 10, Clause 1 of the United States Constitution, prohibiting *ex post facto* laws, has been violated insofar as Section 10 of the 1958 Ordinance provides that any violation shall be punishable by serious fine or imprisonment or both and that each week's "continued violation shall constitute a separate additional violation." Until this ordinance was enacted, underwater excavation was not only legal because not prohibited by statute, but was judicially and expressly approved and permitted in the 1956 judgment (Appendix, exhibits 2 and 3). The 1958 statutory provisions for fine and imprisonment (Section 10) for conducting such operations (Section 4(h)) and for failing to comply with Section 4(j) of the ordinance (which requires that the 20 acres be re-filled with 1,000,000 cubic yards of fill which had theretofore been legally removed) constitute a violation of Article I, Section 10, Clause 1 which provides: "No state shall • • • pass any • • • ex post facto law • • • ." *Calder* v. *Bull*, 3 Dallas (U. S.) 386, 390.

In *Burgess* v. *Salmon*, 97 U. S. 381, this Court held unconstitutional, as *ex post facto* legislation, a statute which

provided punishment, "criminally and civilly" for an act which was not illegal when committed, although in that case civil punishment was involved in the action brought by Government. The issue before this Court was stated as follows (p. 382): "The case presents but a single point: Can a manufacturer be punished, criminally and civilly, —*civilly here*,—for the violation of a statute, when the statute was not in force at the time the act was done?"

We believe that the dissenting opinion (Appendix, pp. 4a-10a) (in which 3 judges joined) correctly concludes that the 1958 amendment of Ordinance #16 falls within the ambit of *ex post facto* legislation. The majority opinion does not consider this issue.

It is respectfully submitted that the judgment below be reversed; or in the alternative that a plenary consideration of the constitutional issues involved in this cause be allowed by this Court.

Respectfully submitted,

MILTON I. NEWMAN
Counsel for Appellants
29 Broadway
New York 6, N. Y.

BAAR, BENNETT & FULLEN
and EDWARD M. MILLER,
of Counsel

Appendix (Exhibit 1) Majority Opinion of Court of Appeals of the State of New York

TOWN OF HEMPSTEAD, Respondent, *v.* HERBERT W. GOLDBLATT et al., Appellants.

Decided January 19, 1961.

BURKE, J. The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions.

The defendants seek to revise a judgment of the Appellate Division unanimously affirming a judgment of Special Term upholding the constitutionality of the ordinance and enjoining the defendants from conducting sand mining and excavation on certain property in the Town of Hempstead until a permit has been issued and certain violations of the ordinance have been corrected. They contend that the ordinance cannot be sustained as a valid exercise of police powers and that it violates defendants' vested rights in an established nonconforming use.

Since the courts below have unanimously found that the defendants' proof failed to overcome the presumption of constitutionality and to establish the unreasonableness of the regulations, we may not hold that the ordinance which is an exercise of the town's statutorily delegated police power is invalid, unless there is no justification on "any state of the facts". (*United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 154.)

The sand and gravel pit in question lies in the midst of a densely populated residential area. Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children. The pit itself occupies

a 38-acre tract of which approximately 20 acres is beneath an artificial lake with an average depth of 25 feet. In order to provide protection against the danger of cave-ins, falls, drownings and water pollution, the ordinance makes provision for setbacks, degrees of slope, barricades, fences, lights, retaining walls and maximum ground water level. Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction of certain violations of the ordinance. There are approximately 18 acres which are available for excavation. The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge, and their restraint need not await an event.

The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end. Upon this record a threat to the community's welfare may at least be said to be "reasonably apprehended". (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219.) "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining [case cited]. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community." (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410.) It is not the function of the courts but of legislators to determine the "reasonableness, wisdom and propriety" of the regulations needed to

protect the community (*South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191), and their regulatory power, as the United States Supreme Court has pointed out, governs pre-existing uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied, 360 U. S. 902). Recognizing, therefore, that this court may not question the need for the legislation (*Olsen* v. *Nebraska*, 313 U. S. 236, 246) where there is found, as here, a rational basis for the legislative choice and no factual support for declaring it arbitrary (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413, 418-420), we do not believe that this ordinance can be declared as a matter of law to go beyond regulation to a degree which would impair its validity.

The judgment appealed from, therefore, should be affirmed, with costs.

Dissenting Opinion of Court of Appeals

VAN VOORHIS, J. (dissenting). Defendants appeal as of right from a judgment upholding the constitutionality of Ordinance No. 16 of the Town of Hempstead, and enjoining the defendants from operating a sand and gravel pit until a permit has been issued by the Town of Hempstead, and certain violations of the said ordinance have been corrected. The defendant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead, which is the property involved in this litigation. The other defendant, Builders Sand and Gravel Corp., is the operator of the business of excavating and selling the sand and gravel taken from the land. The property was purchased by Mr. Goldblatt's father in 1927 and the excavation and sale of sand and gravel has been carried on since 1927. Within a year after operations began, the excavation had gone below water level and an artificial lake was created, averaging now approximately 25 feet in depth.

The entire premises of defendant Goldblatt are surrounded by 7,000 lineal feet of a 6-foot chain-link fence, topped by 3 strands of barbed wire. The fence was built and the gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith.

When the 38 acres of land owned by defendant Goldblatt were purchased and dredging operations began in 1927, the surrounding property was mainly farm land. The first provision for residential zoning of property was enacted in January, 1930. Thereafter and during the time defendants continued their dredging operations, the surrounding area became heavily populated. Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious.

In 1956 the plaintiff town brought to trial its first legal proceeding to terminate the defendants' dredging operations. That was a suit in Supreme Court, Nassau County, to restrain defendants from operating on the theory that defendants' dredging operations constituted a violation of the Zoning Ordinance of the Town of Hempstead.

It was held that defendants had a legal right, consisting of a prior nonconforming use, to continue their excavation and operations under water on their "entire premises • • • notwithstanding any Ordinances of the plaintiff". The opinion of Justice HILL states: "I find that the defendants are now and have been since 1927 conducting a prior nonconforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this nonconforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537." No appeal was taken from the judgment entered upon the opinion of Mr. Justice HILL.

In 1958 Ordinance No. 16 was amended to prohibit all excavation below water level and to require the filling in of excavations previously made. Defendants now conduct the only sand and gravel business by dredging in Hempstead and it would appear that the ordinance was aimed directly at them.

In the 1956 litigation before Mr. Justice HILL, the town did not bring into litigation or rely on the provisions of the original 1945 Ordinance No. 16 for the reason that defendants' operations complied with the regulatory provisions of the 1945 ordinance. It was not until the 1958 amendment of the ordinance that excavation below ground water level was prohibited.

The plaintiff township would distinguish an invalid retroactive zoning ordinance attempting to eliminate a "nonconforming use" (*Matter of Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553; *Town of Somers* v. *Comarco*, 308 N. Y. 537) from a

"regulatory" ordinance which regulates the nonconforming use in the interest of public health and safety (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied 360 U. S. 902). Both lower courts applied this distinction and held that the 1958 ordinance was a proper police power regulation designed to abate a dangerous situation.

While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to force the defendants out of business. The decision below has that in practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act "innocent when done" (*People* v. *Oliver*, 1 N. Y. 2d 152, 158). In consequence it may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business.

A reading of the *Saxl* and *Engelsher* cases (*supra*) cited by the respondent town indicates that they were truly mere "regulatory" ordinances which did not operate to confiscate and prohibit absolutely. Since Ordinance No. 16 virtually eliminates the nonconforming use and prohibits unconditionally and finally all underwater dredging previously conducted on 20 acres of defendants' property, the theory

of "regulation" cannot reasonably be sustained. The following observation of Mr. Justice HOLMES in *Pennsylvania Coal Co.* v. *Mahon* (260 U. S. 393, 415-416) is applicable: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Similar language was used by this court in *Arverne Bay Constr. Co.* v. *Thatcher* (278 N. Y. 222, 231).

In *People* v. *Calvar Corp.* (286 N. Y. 419) this court stated (p. 421): "Forceful argument may be made that a general and complete prohibition of such use of property, even where such use might be permitted without causing substantial injury to the community, would be unreasonable. That question must await determination until it arises. We express no opinion upon it. In this case there has been no such complete and absolute prohibition."

We think that this case falls within the ambit of the question left unanswered in the *Calvar* case.

Furthermore, in the *Harbison* case (4 N. Y. 2d 553, *supra*), it was held that the value of the investment in the property was relevant in determining the validity of an attempted elimination of a nonconforming use. In this case, defendants attempted to show the value of their investment but the trial court ruled against the introduction of such evidence. Such evidence was important and admissible under the majority ruling in the *Harbison* case and also under the doctrine in *People* v. *Miller* (304 N .Y. 105, 108, 109) where this court held that unless the "loss to the owner" of a prior nonconforming use is "slight and insubstantial" it could not be wiped out by an ordinance (see, also, *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540,

supra). The record does indicate, however, the substantial nature of defendants' business.

In *Trio Distr. Corp.* v. *City of Albany* (2 N. Y. 2d 690, 696), we held that an ordinance was invalid "prohibiting the conduct of an occupation under the guise of regulation."

Upon the argument the attorney for plaintiff-respondent said in answer to questioning that he does not contend that this condition amounts to a nuisance, but that excavations of this kind are subject to regulation by ordinance under the police power. Of course they are, in the interest of public health and safety, but an examination of the clauses in the 1958 amendments to this Ordinance No. 16 supports the contention that it was directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object is not to promote public health or safety, but to end the operation of this business under the guise of regulation.

The very circumstance that this gravel pit was conducted in conformity with the 1945 regulatory ordinance was exploited by the town to trap defendants by changing the permitted grade of the declining angle of the slope of the pit from 45 to 30 degrees, and by requiring a concrete curb beneath the 7,000 feet of fence which was built according to the 1945 requirement. No object in the installation of this concrete curbing has been shown except that it would put defendants to the expense of removing the fence, laying the concrete and constructing a new fence. This, along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation.

In 1959 the United States Bureau of Mines statistics show that the business of excavating and selling sand and gravel in the country totalled more than $700,000,000 and more than $27,600,000 in New York State alone. Much must have been spent on Long Island where, respondent itself asserts, building operations have proceeded at a high rate in the Town of Hempstead. There is nothing inherently dangerous or evil about this business, nor about excavating under water, which, especially in this area, has been a vital necessity. The minutes of the trial before Justice HILL, in evidence here, show that the gross annual business of defendants was in excess of $200,000 and that their capital investment was approximately $241,000. All of this is important as indicating that this is a lawful business which the "Declaration of Policy" in the ordinance says it was enacted to suppress. The regulatory provisions of the ordinance adopted in 1945, it is virtually conceded, were adequate to furnish protection against whatever hazards were created by the sand and gravel pits. That appears to have been drawn in substantially the same form as in the case of towns generally in the County of Nassau. Nor does the circumstance alter the case that there are 18 more acres in the tract which the photographs show to be entirely occupied by the machinery used in the operation of the sand and gravel pit. Even if the land on which the machinery is located could be utilized for excavation, it would not help the ordinance which unlawfully prevents the operation of a lawful business on the 20 acres. It may be noted that, although the trial court excluded evidence of the value of the installations, the assessed valuation is in evidence as $66,000.

In endeavoring to close this pit the town says much about the safety of children. They are protected by the regulatory provision of the ordinance as it was enacted in 1945 according to a pattern prevalent throughout the county.

The one drowning mentioned in the entire history of this pit, which is not shown by the record but does appear, we are told, from the police reports, happened in 1944 before the enactment of any ordinance requiring a fence to surround the excavation. The evidence indicates the existence of ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences. The presence of violations of the ordinance elsewhere would not, of course, prevent its enforcement, but it confirms that the object here was not regulation but prohibition of the conduct of this business. There are some hazards in the operation of any legitimate business. Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.

The judgment appealed from should be reversed and the complaint dismissed, with costs in all courts.

Chief Judge DESMOND and Judges DYE and FULD concur with Judge BURKE; Judge VAN VOORHIS dissents in an opinion in which Judges FROESSEL and FOSTER concur.

Judgment affirmed.

Appendix (Exhibit 2) Opinion in Prior Litigation

Dated March 8, 1956

TOWN OF HEMPSTEAD,

v.

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

By this action plaintiff, Town of Hempstead, seeks an injunction restraining defendant from the operation of a sand and gravel business on premises described in the complaint as a violation of the town zoning ordinance. Defendants' counterclaim for a determination that the ordinance is invalid insofar as it restrains them from the operation of a sand and gravel business on the premises.

Defendants or their predecessors have owned and conducted a sand and gravel business on the 38 acre parcel described in the complaint since 1927. The first zoning ordinance of the town was adopted in 1930. I find that the defendants are now and have been since 1927 conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant the continuance of this non-conforming use, see People v. Miller, 304 N. Y. 105; Town of Somers v. Camarco, 308 N. Y. 537.

I, further, find that there has been a substantial use of the entire premises to entitle defendants to continue their operations, *in futuro*, as to the entire premises.

The complaint is dismissed and the counterclaim granted insofar as it seeks a determination that the prior non-conforming use can be carried on on the entire premises with costs to defendants.

The foregoing constitutes the decision of the court pursuant to the provisions of the Civil Practice Act.

Settle Judgment.

HILL
J. S. C.

Appendix (Exhibit 3) Judgment in Prior Litigation

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Nassau County Courthouse, Old Country Road, Mineola, New York, on the 5th day of April, 1956.

Present:

HON. L. BARRON HILL,

Justice.

7006/54

TOWN OF HEMPSTEAD,

Plaintiff,

against

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

Defendants.

The issues in this action having duly come on to be heard before this Court at a Special Term, Part I thereof, held at the Nassau County Courthouse, Mineola, New York, on the 14th and 15th days of February, 1956, and the plaintiff having appeared by John A. Morhous, Esq., by Edward M. Kolbell, Esq., of counsel, and the defendants having appeared by Edward M. Miller, Esq., and the allegations and proofs of the respective parties having been duly heard and considered, and the Court having made its decision in writing, dated March 9, 1956, and having in its aforesaid decision directed the dismissal of the complaint and having granted judgment to the defendants on the counterclaim

insofar as it sought a determination on the non-conforming use, with costs to the defendants, and the costs and disbursements of the defendants being the sum of $78.38, as taxed by the County Clerk of the County of Nassau, and on motion of Edward M. Miller, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises described in the complaint, notwithstanding any Ordinances of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, of Newbridge Avenue, East Meadow, New York, recover of the plaintiff, of Town Hall, Front Street, Hempstead, New York, the sum of $78.38, costs and disbursements, as taxed, and that the defendants have execution therefor.

Judgment this 5 day of April, 1956.

Enter

HILL.
Justice Supreme Court

Appendix (Exhibit 4) Pertinent Provisions of Ordinance 16

Section 4(h) of Ordinance No. 16, as amended on November 25, 1958, provides:

> No excavation shall be made below two feet above the maximum ground water level at the site.

Section 4(j) provides:

> When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, non-burnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

Section 10 provides:

> *Penalties.* For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building on premises where such violations have been committed or shall exist, and the lessee or tenant of the premises where such violation has been committed or shall exist and the owner, general agent, contractor, lessee or tenant of any part of the premises in which part of said violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits, takes part or assists in any such vio-

lation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $500.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

Appendix (Exhibit 5) Order of Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *SS.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of January, in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS:

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR

January 19, 1961—No. 272

TOWN OF HEMPSTEAD,
Respondent,

v.

HERBERT W. GOLDBLATT & ano.,
Appellants.

BE IT REMEMBERED, That on the 20th day of August in the year of our Lord one thousand nine hundred and sixty, Herbert W. Goldblatt & ano., the appellants in this cause, came here unto the Court of Appeals, by Baar, Bennett & Fullen and Edward M. Miller, their attorneys, and filed

in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Hempstead, the respondent—in said cause, afterwards appeared in said Court of Appeals by John A. Morhous, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Milton I. Newman, of counsel for the appellants, and by Mr. William C. Mattison, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Appendix (Exhibit 6) Judgment of Supreme Court of New York (Nassau Co.) Entered on Order of Remittitur

JUDGMENT

File No.

4811/1959

SUPREME COURT—NASSAU COUNTY

TOWN OF HEMPSTEAD,

Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP.,

Defendants.

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard said appeal and having ordered and adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the said Court of Appeals having been filed in the office of the Clerk of the County of Nassau and the order having been entered thereon on the 15th day of February, 1961 making the order of the Court of Appeals the order of this Court and directing the entry of a judgment of

affirmance herein with the costs of said appeal to be taxed in favor of the plaintiff against the defendants.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead, Town Hall, Hempstead, N. Y., it is

ADJUDGED that the judgment of affirmance entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960 be affirmed; and it is further

ADJUDGED that plaintiff, Town of Hempstead, Town Hall Hempstead, N. Y. do recover of and have judgment against defendants, Herbert W. Goldblatt, 127 Stevens Ave., Hempstead, N. Y. and Builders Sand & Gravel Corp., Newbridge Ave., East Meadow, N. Y. in the sum of $203.63 the costs and disbursements as taxed by the Clerk of this Court and that petitioners have execution therefor.

Dated
Feb. 21, 1961

FRANCIS J. ANDERSON
Clerk